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GOOD QUANTUM SDN BHD & ORS v. ALLIANCE INVESTMENT BANK BHD

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
IDRUS HARUN JCA
B PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: W-02-969-05-2012]
23 JANUARY 2015

C ***CONTRACT:*** *Collateral contract – Existence of – Failure to settle outstanding balance due to respondent – Restructuring exercise of company – Whether payment of outstanding sum based on successful completion of restructuring exercise – Condition precedent – Whether appellants induced to enter various agreements in reliance of respondent's assurance – Whether respondent aware of collateral contract – Sale of shares to satisfy part of debt before successful completion of restructuring* D *exercise – Whether first appellant suffered losses and damages – Whether respondent breached collateral contract*

The respondent, a licensed bank, granted a margin facility with a maximum principal limit of RM6,000,000 to Dunia Dimensi Sdn Bhd ('Dunia Dimensi') based on the terms and conditions contained in the margin E agreement. Dunia Dimensi, the first appellant and the respondent entered into a novation agreement where the first appellant assumed all of Dunia Dimensi's obligations and liabilities under the said margin agreement. The first appellant undertook to repay all sums due and owing by Dunia Dimensi to the respondent under the margin agreement with interest F ('redemption sum'). As a consideration thereof, Dunia Dimensi would transfer all 13,849,500 of its shares in Putera Capital Bhd ('the PCB shares') to the first appellant. A repayment agreement was then entered into between the first appellant and the respondent where it was agreed, *inter alia*, that the first appellant would settle the redemption sum in the manner stated G therein. *Vide* the letter of guarantee and indemnity, the second, third and fourth appellants had jointly and severally agreed to pay the respondent upon demand, all sums due and owing by the first appellant to the respondent under the novation agreement and the repayment agreement. However, disputes arose when the first appellant failed to settle the sums H due and owing to the respondent. In light of the first appellant's continuous default, the respondent proceeded to sell the PCB shares to satisfy part of the debt due. The first appellant failed to settle the balance due and as a result, the respondent filed a claim in the High Court to recover the said balance. The appellants argued, *inter alia*, that there was a collateral contract to the novation agreement, repayment agreement and the guarantee where I it was understood that the first appellant would take over the obligations of Dunia Dimensi's defaulting loan in consideration of the transfer of the PCB shares in favour of the first appellant with a view to facilitate PCB's restructuring exercise. It was also argued that the respondent had made the

following representations, *ie*, that (i) a special purpose vehicle would take over the PCB shares to ensure the rehabilitation of PCB from its PN17 status; (ii) the plaintiff shall hold the PCB shares on trust until the successful completion of PCB's restructuring exercise; and (iii) PCB would be worth more than its market capitalisation. Apart from the said representations, it was asserted that *vide* the collateral contract, the first appellant would service the monthly interest pending the successful completion of PCB's restructuring exercise and the guarantors would only be liable if the first appellant defaulted in the payment. Having relied on the respondent's representation and based on the collateral contract, the appellants argued that they were induced to enter and execute the novation agreement, repayment agreement as well as the guarantee. It was also contended that the respondent had acted in breach of the collateral contract since they insisted on the payment and had unlawfully sold PCB's shares before the successful completion of PCB's restructuring exercise. Alternatively, it was submitted that it was a condition precedent to any liability on the part of the first appellant that approval was obtained from Bursa Saham Malaysia Bhd ('Bursa') for the transfer of the PCB shares to the first appellant. However, since Bursa's approval was not obtained, it was alleged that the respondent could not enforce the agreements executed between the parties. As a consequence of the improper sale of the PCB shares, the first appellant counter claimed for losses and damages suffered by it due to the respondent's negligence and the fact that the first appellant had been deprived of its rights to redeem the PCB shares. In the High Court, the appellants were found liable and judgment was granted in favour of the respondent. Hence, this appeal.

Held (allowing appeal with costs)
Per Prasad Sandosham Abraham JCA delivering the judgment of the court:

(1) The respondent invited the appellants to enter into a proposed restructuring exercise where the pledge of the PCB's shares would be redeemed by the first appellant and in return, PCB would be restructured, removed from PN17 status and by virtue of the reverse takeover, the first appellant would be in control of PCB. It was inconceivable that the appellants would have agreed to enter into such an arrangement if not for the restructuring exercise. Further, the respondent had caused itself to be appointed as an advisor for the proposed restructuring exercise and was to earn a fee of RM600,000. (paras 30 & 31)

(2) The restructuring exercise required the Securities Commission's ('SC') approval and that of other regulatory authorities. While this was pending, the interest was serviced. The repayment agreement, novation agreement and the guarantee were linked to the success of the corporate restructuring and were a condition precedent to liability under these

agreements. However, there was inducement, persuasion and assurance from the respondent which constituted the collateral contract prior to the execution of the said agreements. (paras 32, 33 & 35)

(3) The learned High Court Judge failed to appreciate the evidence in respect of the collateral contract. The parties signed the repayment agreement, novation agreement and guarantees for taking over Dunia Dimensi's liability due to the respondent's assurances given to the appellants under the restructuring exercise. It would be incredulous for the appellants to have agreed to take over these liabilities if not for the assurances under the restructuring exercise. Since the restructuring had been rejected by the SC, the appellants could not have been held liable. Further, the respondent was aware of this collateral arrangement and participated in them as an advisor of the restructuring exercise to earn a hefty fee. In the circumstances, the appellants' counterclaim was allowed. (paras 35 & 36)

Case(s) referred to:

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

His Royal Highness Prince Jefri Bolkiah and Others v. The State of Brunei Darussalam & Anor [2007] UKPC 63 ***(refd)***

Tan Swee Hoe Co Ltd v. Ali Hussain Bros [1979] 1 LNS 113 FC ***(refd)***

For the 1st, 3rd & 5th appellants - Yap Bell Pung; M/s Haresh Mahadevan & Co

For the 2nd & 4th appellants - Jagjit Singh (Rafie Shafie & Joshua Vijayan Dharmaraj with him); M/s Sreenevasan Young

For the respondent - Nad Segaram (Soo Siew Mei with him); M/s Shearn Delamore & Co

Reported by Kumitha Abd Majid

JUDGMENT

Prasad Sandosham Abraham JCA:

[1] The facts forming the background to this appeal before us have been elucidated quite succinctly in the grounds of Her Ladyship, the learned judge and we have precise it in our present judgment. For ease of reference we shall refer to the parties as plaintiff and defendants.

Brief Background

[2] The plaintiff is a licensed bank incorporated in Malaysia and carries on the business of banking. By a vesting order dated 28 December 2006 issued by the High Court at Kuala Lumpur *vide* an *ex parte* Originating Summons No. D4-24-429-2006, the entire business of Kuala Lumpur City

Securities Sdn Bhd (Company No. 126994-W) ("KLCS") including all of its rights, assets and obligations were transferred to and vested in the plaintiff in their entirety, effective 30 December 2005.

[3] Pursuant to a letter of offer dated 24 March 2004 and Margin Trading Facility Agreement dated 24 March 2004 ("the said margin agreement"), the plaintiff granted to Dunia Dimensi Sdn Bhd ("Dunia Dimensi") a margin facility with a maximum principal limit of RM6,000,000 ("the said margin facility") based on the terms and conditions contained in the said margin agreement.

[4] A novation agreement dated 23 August 2006 ("NA") was entered into between Dunia Dimensi, the first defendant and the plaintiff whereby the first defendant assumed all of Dunia Dimensi's obligations and liabilities under the said margin agreement and also undertook to repay all sums due and owing by Dunia Dimensi to the plaintiff under the margin agreement with interest ("the redemption sum") and as consideration thereof, Dunia Dimensi would transfer all 13,849,500 of its shares in Putera Capital Berhad ("the PCB Shares") to the first defendant.

[5] A repayment agreement dated 23 August 2006 ("RA") was entered into between the plaintiff and the first defendant whereby the plaintiff and the first defendant agreed *inter alia* that the first defendant would settle the redemption sum in the manner stated therein.

[6] By a letter of guarantee and indemnity dated 23 August 2006 ("the guarantee") the second, third and fourth defendants had, upon the consideration contained therein, agreed jointly and severally to pay to the plaintiff upon demand, all sums due and owing by the first defendant to the plaintiff under the said NA and the said RA including interest, commissions, fee and legal costs up to the maximum principal sum of RM7,500,000 subject to the terms and conditions contained therein.

[7] Despite numerous demands and indulgences as pleaded in the statement of claim, the first defendant had failed to settle the sums due and owing to the plaintiff under the said NA and the said RA amounting to RM4,174,976.15 as at 3 October 2008. The plaintiff's claim in its action against the first defendant is for the sum of RM4,174,976.15 as at 3 October 2008 with continuing interest as sums due and owing. The plaintiff's claim against the second to fourth defendants is based on their liability under their respective guarantees.

[8] The plaintiff's claim against the defendants was for debts due and accruing from the margin facility between the plaintiff and Dunia Dimensi. The plaintiff, through its solicitors sent a letter of demand dated 26 February 2007 demanding for the repayment of the loan. The plaintiff claims that up till 13 February 2008, the first defendant only made part payment of RM515,635.19. Letters were sent by the defendants seeking indulgence from the plaintiff as to the delay in repaying the loan.

(a) By a letter dated 25 February 2008, the first defendant sought the indulgence of the plaintiff in the repayment of the loan, to which the plaintiff agreed (pertaining to an approval of a restructuring scheme by Securities Commission). However, the plaintiff claims that the first defendant defaulted in the repayment again and the plaintiff's solicitor sent a notice dated 5 March 2008 whereby the plaintiff informed that they will proceed to sell the PCB shares if the defendants continued to default the payment. On 17 March 2008, the plaintiff informed *via* letter that they had force sold some of the PCB shares for payment of the debt due and would continue doing so until the debt is satisfied.

(b) The first defendant then requested through a letter dated 18 March 2008 to hold on to the selling of the PCB shares and made proposals for repayment and sought further indulgence on the previous proposals made, to which the plaintiff agreed. However, due to the defendants' continuous default, the plaintiff through its solicitors sent a letter of demand on 8 April 2008. Although the defendants sent letters dated 6 May 2008 and 15 May 2008 seeking indulgence, the plaintiff rejected the defendants' proposal, stating that no further indulgence would be given and the plaintiff will proceed to sell the shares and take legal action against the defendants.

(c) Due to continuous requests from the defendants, the plaintiff decided to give final indulgence based on certain terms and conditions, to which the first defendant agreed (*via* letter dated 10 July 2008), with a counter proposal that was accepted by the plaintiff *via* letter dated 14 July 2008. As consideration, the first defendant enclosed six post-dated cheques *via* letter dated 17 July 2008 to the plaintiff amounting to RM810,000.

[9] The plaintiff claims that the cheques did not satisfy the debt and/or the defendants did not follow the proposal that was agreed upon. The plaintiff returned the cheques and proceeded to sell all the balance PCB shares amounting to RM2,922,542.31 to satisfy part of the debt due.

[10] Thereafter, the plaintiff through its solicitors sent another letter of demand to the first defendant on 23 October 2008 and to the second till fourth defendants (as guarantors) on 4 November 2008, for the balance debt still due and accruing but the defendants failed and/or neglected to satisfy the debts. As such, the plaintiff, through this suit, claims for debts due and accruing amounting to the sum of RM4,174,976.15 together with interest and cost.

[11] The plaintiff denies the existence of any collateral contract as alleged by the defendants and further contends that the first defendant has admitted its liability to the plaintiff under the said NA as well as the RA.

The First, Second & Fourth Defendants

[12] The first defendant contends that Patrick Soh Kim Ngiap (Patrick) the Executive Director of Operations of KLCS, (now the plaintiff) in or about March 2006, approached Datuk Chang Kok Chuang (the third defendant, a Director of Right Development Activities Sdn Bhd (RDA) to be the white knight earmarked by AMBB to rehabilitate PCB, under a proposed restructuring exercise. It was further contended that certain representations were made by Patrick to the third defendant.

[13] The representations were as follows:

(i) a special purpose vehicle will take over the PCB shares that would ensure the rehabilitation of PCB from its PN17 status;

(ii) the third party was only required to service monthly interest pending the successful completion of PCB's restructuring exercise;

(iii) the third party shall only be required to pay for the PCB. Shares upon the successful completion of PCB's restructuring exercise, and after the necessary approval from the regulatory authorities for the same are obtained, and that the guarantors shall only be liable in the event of non-payment by the first defendant. This would assist KLCS to recover the non-performing loan of Dunia Dimensi;

(iv) the plaintiff shall hold the PCB shares on trust and shall re-deliver the PCB shares to the third party/special purpose vehicle after the successful completion of PCB's restructuring exercise;

(v) PCB will be worth more than its market capitalisation and that PCB's PN17 status will not be an issue, as AMBB was the corporate adviser; and

(vi) the third party shall play an active role in PCB's restructuring exercise.

[14] By reason of the matters set out above, the first defendant contends that there was in existence a collateral contract to the NA, RA and the guarantee between the plaintiff and the defendants.

[15] Beside on the existence of the above representations, the first defendant also contends that there were salient terms of the collateral contract and the terms were as follows:

(i) That the first defendant shall take over the obligations of Dunia Dimensi's defaulting loan in consideration for the transfer of the PCB shares in favour of the first defendant, with a view to facilitate the rehabilitation of, and PCB's restructuring exercise;

(ii) The price to be transacted for PCB shares was set by KLCS at RM0.551 per share, when the closing price for the PCB shares at the, material time was RM0.36 per share;

(iii) That the first defendant shall only service monthly interest pending the successful completion of PCB's restructuring exercise and that the guarantors shall only be liable in the event of non-payment by the first defendant.

[16] Acting upon and in reliance upon the purported representations by KLCS/plaintiff and based on the collateral contract, the defendants contend that they were induced to enter and execute the NA, RA as well as the guarantee. It is also the first defendant's contention that the plaintiff has acted in breach of the collateral contract by reason of, *inter alia*;

(i) The insistence of payment for the PCB Shares before the successful completion of PCB's restructuring exercise; and

(ii) The unlawful sale of 14,000 of the PCB shares on 17 March 2008 and the continued sale of PCB shares before successful completion of PCB's restructuring exercise.

[17] Alternatively, it is contended, that by the NA and RA, it was a condition precedent to any liability on the part the first defendant that approval is obtained from Bursa Saham Malaysia Berhad for the transfer of the PCB shares to the first defendant. However, the said condition was not performed since the Bursa's approval was not obtained. By that token it follows, the plaintiff cannot now seek to enforce the aforesaid agreements.

[18] As a consequence of the improper sale of the PCB Shares by the plaintiff, the first defendant has suffered loss and damage and claims for damages for conversion.

[19] In its counterclaim, the first defendant claims that the plaintiff had negligently, recklessly and/or was guilty of *mala fide* when it failed to make the most of the security in the PCB shares to the best of advantage and/or to the material prejudice of the first defendant. It is contended by the first defendant that as at 17 March 2008, the PCB shares were worth RM3,739,365 (the security value), and that the plaintiff could have realised the said sum in settlement of the alleged outstanding amount. As a result of the plaintiff's negligence, the first defendant has been deprived its rights to redeem the PCB shares, and accordingly now are claiming for loss and damages.

[20] Dunia Dimensi was granted the said margin facility which it used to acquire 13,849,500 shares of PCB (PCB shares). In about the year 2005, Dunia Dimensi was unable to repay the margin facility with interest accrued thereon and had been deemed non performing.

[21] The plaintiff entered into discussions with the fifth defendant to act as the phrase is commonly known in commercial parlance "the white knight" in a corporate restructure of PCB. The initial plan was for the loan

of Dunia Dimensi loan to be repaid and PCB rehabilitated and a reverse takeover of PCB by the fifth appellant. To this end, several meetings were held between the third defendant, PW2 and PW3 (see evidence of PW3 at pp. 449-450 Rekod Rayuan Jilid. 2(2) Bahagian B).

[22] The third defendant was advised by the plaintiff for the takeover of PCB to inject construction projects worth RM300 million into PCB. In the spirit of this proposed corporate restructure exercise, on 7 June 2005, the plaintiff wrote a mandate letter to PCB to offer advice on the corporate exercise and to act as advisor for a fee. It stands to reason to act a "white knight" this letter would not have been issued if not for the existence of these collateral terms (mandate letter found in pp. 932-942 Rekod Rayuan Bahagian C, see also Q&A4 and Q&A5 at pp. 431-432 Rekod Rayuan Jilid 2 Bahagian B).

[23] The aforesaid evidence in relation to the collateral contract as pleaded by the appellants was before the learned judge but the learned judge chose to confine herself to the four corners of the novation agreement, the repayment agreement and the guarantees and since these documents made no reference to the collateral contract, the learned judge rejected the argument of a collateral contract.

[24] We are well aware that an appellate court would be loathed to interfere with the findings of facts made by the learned judge at a trial save and except in exceptional circumstances, however we find that the learned judge had failed to properly evaluate the body of evidence before the court to establish the existence of a collateral contract as pleaded by the appellants.

[25] We therefore find that this case decries appellate intervention despite the High Court findings of fact, and reference is made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* reported in [2004] 4 CLJ 309 where it was held:

> [1] The Court of Appeal had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of the evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This was reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This was consistent with the established "plainly wrong" test. Therefore, there

A was no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. What the Court of Appeal had done was merely to accentuate the established "plainly wrong" test consistently applied by the appellate courts in this country. (pp 320 f-h & 321 a).

B **[26]** Turning to the issue of the existence of a collateral contract being in existence as pleaded by the appellants, the law on the same has developed over period of a time and the Federal Court decision in the case *Tan Swee Hoe Co Ltd v. Ali Hussain Bros* [1979] 1 LNS 113; [1980] 2 MLJ 16 is referred wherein the Federal Court held:

C An oral promise, given at the time of contracting which induces a party to enter into a contract overrides any inconsistent written agreement. The device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

D **[27]** The above case is applicable in our case. I also refer to the judgment of His Royal Highness Raja Azlan Shah CJ (as His Highness then was) and I quote:

In our view there is a growing body of authority which supports the
E **proposition that a collateral agreement can exist side by side with the main agreement which it contradicts.** The classic statement on collateral contract was made by Lord Moulton in *Heilbut Symons & Co v. Buckleton* [1913] AC 30 47. "It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will
F give you one hundred pounds', is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract." The case of *City and Westminster Properties (1934) Ltd v. Mudd* [1959] Ch 129 and the subsequent applications of it has, in our opinion, fortified this not
G unfamiliar doctrine. We think Lord Denning M.R. summarised it in *Dick Bentley Productions, Ltd v. Harold Smith (Motors), Ltd* [1965] 2 All ER 65 67: "Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract,
H that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on."

In *Mudd*'s case, *supra*, a tenant signed a lease containing a covenant to
I use the premises for business purposes only. He had in fact resided there for some time and was only induced to sign the lease by an oral assurance that the lessors would not object to his continuing to do so. In an action by the lessors to forfeit the lease for breach of the

convenant it was held that the tenant could rely on the oral assurance as "a clear contract acted upon by the defendant to his detriment from which the plaintiffs cannot be allowed to resile." Yet the oral, agreement clearly contradicted the lease.

Three recent decisions are worth mentioning, ie, *Mendelssohn v. Normand Ltd* [1970] 1 QB 177; *J Evans & Son v. Andrea Merzario* [1976] 2 All ER 930; *Brikom Investments Ltd v. Carr* [1979] 2 All ER 753.

In *Mendelssohn v. Normand Ltd supra*, the car owner left his car unlocked at a car park after he had been assured by the attendant that the car would be locked. His suitcase was later stolen from his unlocked car. The parking ticket by its terms protected the defendant. It was also specifically argued that the terms could not be varied by the oral assurance of the attendant. In spite of all that the Court of Appeal held that the assurance given by the attendant that the car would be kept locked overrode the written terms. "The reason is because the oral promise or representation has a decisive influence on the transaction – it is the very thing which induces the other to contract – and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation" (Per Lord Denning at page 184). Phillimore LJ said at page 186: "Whether you regard that promise as a representation or whether you regard it as a collateral term of the contract, or whether you regard the contract as being partly oral and partly in writing in the shape of the ticket it seems to me it can make no real difference."

In *J Evans & Son v. Andrea Merzario supra*, the defendant forwarding agents assured the plaintiff importers that containers in which the latter's goods were stored would be carried under deck. Prices were renegotiated but nothing was put in writing in relation to the containers being carried below deck. The goods were carried "on the usual terms and conditions appearing on the form." When a machine was lost due to the fact that a container was not stored below deck, the plaintiffs succeeded in the Court of Appeal in enforcing the oral assurance. Lord Denning MR considered that the assurance given by the defendant that the containers would be stored below deck was given in order to persuade the plaintiff to accept the use of containers. Because it so induced the plaintiffs, it ought to be binding. "When a person gives a promise, or an assurance to another, intending that he should act on it by entering into a contract, and he does act on it by entering into the contract, we hold that it is binding": see *Dick Bentley Production Ltd. v. Harold Smith (Motors) Ltd., supra.*

In *Brikom Investments v. Carr, supra,* a tenant, relying on the representation made to her by the landlords, that they would repair the roofs at their own expense refused to contribute to the costs of repairs. It was held, *inter alia*, that there was a perfectly good collateral contract between the landlords and her since she had given consideration for the landlords' promise regarding the repairs by entering into the lease in reliance on that promise. "When two parties are about to enter into an agreement

for a lease, a lease which imposes on the lessee a very burdensome obligation in respect to repairs, I can see no reason why one party cannot say to the other: 'In relation to those outstanding matters, whatever may be our legal position under the terms of the lease, we will not as landlords enforce that obligation against you.' I see no reason why effect should not be given to such a position. I think the evidence shows that that was the position here; there was a perfectly good collateral contract between these two parties (per Roskill LJ at page 763)."

In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

[28] This decision was referred to with approval by the Privy Council in the case of *His Royal Highness Prince Jefri Bolkiah and Others v. The State of Brunei Darussalam & Anor* [2007] UKPC 63, we refer particularly to the judgment of Lord Mance at paras. 47 and 48 and I quote.

47. First, I wish to leave open the validity of the alternative "technical legal reason" suggested in paragraph 15 of Lord Scott's opinion. For the respondents, Mr Pascoe QC rightly conceded in the Court of Appeal that "the trouble with the parol evidence rule and the statutory enactments, is one is liable to go round in a circle with the parol evidence rule. If the Court finds that all the terms of a written document – all the terms of an agreement have not been reduced to the written document, of course the Court is going to let evidence in of other terms". The many well-known clauses to prevail over inconsistent oral agreements collaterally agreed (cf. eg, *City and Westminister Properties [1934] Ltd v. Mudd* [1959] Ch 129; *Mendelssohn v. Normand Ltd* [1970] 1 QB 177; *Brikom Investments Ltd v. Carr* [1979] 2 All ER 753, etc). These provide a induced by a collateral agreement or misrepresentation, I find it hard to believe that ss. 91 and 92 would have prevented this being proved and relied upon.

48. There is moreover express authority at the highest level in the neighbouring common law jurisdiction of Malaysia confirming this view. In at least two cases (relied upon by the appellants in their supplemental case, paragraph 6), the Malaysian Federal Court of Civil Appeal applied the common law authorities to which I have referred and took the same view as I would under the identically worded provisions of ss. 91 and 92 of the Evidence Act. They are *Tan Swee Hoe Co. Ltd v. Ali Hussain Bros.* [1980] 2 MLJ 16 (where judgment was given by no less than Raja Azlan Shah CJ) and *Tan Chong & Sons Motor Company (Sdn) Berhad v. McKnight* [1983] 1 MLJ 220. Written agreements were in these cases executed on the faith of an inconsistent collateral oral promise and representation, respectively, and ss. 91 and 92 were held to be no bar to such promise and representation being proved and relied upon. I would not wish to disagree with these authorities.

[29] Having evaluated the evidence that was before us as we are entitled to do it is quite clear that the respondent had invited the appellants to enter into a proposed restructuring exercise, wherein the pledge of shares of PCB, to the first defendant would be redeemed by the first defendant and in return PCB would be restructured, removed from PN17 status and by virtue of the reverse takeover the first defendant would be in control in PCB.

[30] It is inconceivable in our view that the appellants would have agreed to enter into such an arrangement if not for the restructuring exercise, bearing in mind the first defendant was never the original borrower of the said loan. It is also erstwhile to note that the respondent had caused itself to be appointed as an advisor for the proposed restructuring exercise and was to earn a fee of RM600,000 (See Yeong Sook Fun's (PW1) evidence under cross-examination at lines 293-404 of pp. 371-372 of Jilild 2(1) Bahagian B of Rekod Rayuan).

[31] The restructuring exercise would require Securities Commission's (SC) approval and that of other regulatory authorities and while this was pending, interest only was to be serviced and it is not a disputed fact the interest was serviced.

ML : Would you agree that the 1st defendant paid the monthly interest until February 2008?

Yeong: Until when? I cannot recall exactly but they did pay.

[32] We also find that the repayment agreement, the novation agreement and the guarantee are linked to the success of the corporate restructuring and it is a condition precedent to liability under these three agreements. (See evidence of Yeong Sook Fun at p. 358 Rekod Rayuan 2(1) Bahagian B at lines 225-233).

Yeong: Dunia Dimensi's main purpose of taking up the loan is for the margin financing of PCB shares. And when Good Quantum took over the loan, when the loan was novated to Good Quantum from Dunia Dimensi, automatically also the shares were taken over.

ML: This is just a pure and simple straightforward transaction of buying the PCB shares.

Yeong: No. It's a novation of the loan itself.

[33] The respondent through it nominees proceeded under this restricting exercise to apply for the SC's approval (at pp. 1004-1042 Rekod Rayuan Jilid 2(5) Bahagian C). On 28 May 2007, the SC finally rejected the restructuring exercise.

[34] Based on all aforesaid evidence, we find there is credible and sufficient evidence of inducement, persuasion and assurance given by the plaintiff which constituted the collateral contract prior to the execution of the repayment agreement, novation agreement and guarantee. The learned

A High Court Judge based her judgment on the four corners of the existing agreements. The learned trial judge in our view failed to appreciate the evidence that was before the court in respect of the collateral contract. The important question that the learned judge should have asked herself is whether if the arrangements under restructuring exercise were not in place,
B would the first defendant have signed the novation agreement, the repayment agreement and the guarantees. In our view the evidence points to the fact that they signed these agreements which in effect means a taking over of Dunia Dimensi liability with the plaintiff because of the assurances given by the plaintiff to the defendants under the restructuring exercise. It
C would be incredulous for the defendants to agree take over these liabilities if not for assurances under the restructuring exercise. In fact PW1 made it clear in her evidence that the repayment agreement is related and dependant on the successful restructuring of PCB. Since that restructuring has been rejected by the SC, the appellants could not have been liable by the learned judge.

D **[35]** The learned judge also failed to take into account that the evidence pointed to the plaintiff being fully aware of this collateral arrangement and participating in them as advisor of the restructuring exercised was to earn a hefty fee.

E **[36]** For the aforesaid reasons we find there is merit in this appeal and the court on the upshot orders:

(i) The appeal is allowed with costs.

(ii) The order of the learned judge in the High Court is set aside.

F (iii) The counterclaim of defendants is allowed

(iv) The respondent to pay appellants costs in the sum of RM15,000 here and the court below.

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